

Posford (Migration) [2020] AATA 5227 (7 July 2020)

DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANT:	Mr Richard Mark Posford
CASE NUMBER:	2004593
HOME AFFAIRS REFERENCE(S):	BCC2019/385156
MEMBER:	Hugh Sanderson
DATE:	7 July 2020
PLACE OF DECISION:	Sydney
DECISION:	The Tribunal affirms the decision not to grant the applicant a Partner (Temporary) (Class UK) visa.

Statement made on 7 July 2020 at 1:15pm

CATCHWORDS

MIGRATION –Partner (Temporary) (Class UK) visa – Subclass 820 – relationship had ended – applicant was no longer the de facto partner of the sponsor – decision under review affirmed

LEGISLATION

Migration Act 1958, ss 5CB, 65

Migration Regulations 1994, r 1.09, Schedule 2, cls 820.211, 820.221

CASES

He v MIBP [2017] FCAFC 20

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister to refuse to grant the applicant a Partner (Temporary) (Class UK) visa under s.65 of the *Migration Act 1958* (the Act).
2. The applicant applied for the visa on the basis of his relationship with his sponsor. At that time, Class UK contained only one subclass: Subclass 820 (Partner). The criteria for the grant of this visa are set out in Part 820 of Schedule 2 to the Migration Regulations 1994 (the Regulations).
3. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl.820.221 because the delegate found the applicant's relationship with the sponsor had ended and he was no longer the de facto partner of the sponsor as defined in s.5CB of the Act.

Background

4. The applicant is a citizen of the United Kingdom and is currently 58 years old. He was sponsored in his application by Alison Coleman who was born in the United Kingdom and is an Australian citizen. She is currently 55 years old.
5. The parties claimed they commenced a de facto relationship in May 2017 when the sponsor was living in the United Kingdom. They travelled together to Australia in November 2018 and continued to live together in Australia. The applicant found employment as a bus/coach driver.
6. The applicant notified the Department on 25 November 2019 that his relationship with the sponsor had broken down. He said that he would like to stay in Australia and continue in his occupation as a bus driver for school children.
7. The Department wrote to the applicant noting that his relationship had come to an end and inviting him to provide any further information in support of the application, including whether he met any alternative criteria for the grant of the visa. The applicant responded in a letter dated 10 February 2020 where he stated as follows:
 - He understood the implications of the fact that his relationship with the sponsor had ended;
 - He was currently employed by Logan Coaches as a charter school bus/coach driver; and
 - He was planning to return to the United Kingdom on 4 April 2020 but would like to have a visa for about one or two years to continue working in Australia.
8. The delegate who considered the application noted that as the applicant's relationship with the sponsor had ended he was no longer the de facto partner of the sponsor and therefore did not meet the criteria in cl.820.221(2). As no claims had been made that he had suffered relevant family violence or there was a child of the relationship or that the sponsor had died, the applicant did not meet any of the alternative criteria for the grant of the visa. Accordingly, the application was refused.

Information to the Tribunal

9. The Tribunal wrote to the applicant on 15 April 2020 noting that as his relationship with the sponsor had ended he did not meet the requirement to be in a de facto relationship with the sponsor. The applicant was invited to provide any further information as to whether he met any of the alternate criteria for the grant of the visa.
10. The applicant responded on 28 April 2020 noting that his relationship status with the sponsor had not changed, despite their continuing to be in contact with each other. He claimed that he enjoyed working as a bus driver and that in the current COVID 19 period he was considered an essential driver. He was also working as a replacement bus driver for the rail network.
11. The applicant provided a work reference from his employer which said that he was a valued employee and a letter from the manager of a squash club with which he is a member.
12. The applicant appeared before the Tribunal on 2 July 2020 to give evidence and present arguments.
13. The applicant confirmed that his relationship with the sponsor had ended. He confirmed that they were not living together and although he would like to be able to reconcile his relationship with her, he believed that it would not happen in the near future. He acknowledged that he did not meet the criteria for the grant of the Partner visa although he would like to be able to stay in Australia and believed that he would contribute to the Australian community.
14. For the following reasons, the Tribunal has concluded that the decision under review should be affirmed.

CONSIDERATION OF CLAIMS AND EVIDENCE

15. The issue in the present case is whether the applicant is the de facto partner, as defined in s.5CB of the Act of the sponsor and, if that relationship has ended, if he meets any of the alternative criteria.

Whether the parties are in a spouse or de facto relationship

16. Clause 820.211(2)(a) and 820.221 require that at the time the visa application was made, and at the time of this decision, the applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the applicant claimed to be the de facto partner of the sponsor who is an Australian citizen. He has now stated that the de facto relationship he had with the sponsor has ended.

Are the parties in a de facto relationship?

17. 'De facto partner' is defined in 5CB of the Act, which provides that a person is in a de facto relationship with another person to whom they are not married if they have a mutual commitment to a shared life to the exclusion of all others, the relationship is genuine and continuing, the couple live together, or do not live separately and apart on a permanent basis, and the couple are not related by family: s.5CB(2).
18. In forming an opinion whether they are in a de facto relationship consideration must be given to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the parties' household and their commitment to each other

as set out in r.1.09A(3) which is attached to this decision. Each of the specific matters contained in r.1.09A(3) are effectively questions which must be answered: *He v MIBP* [2017] FCAFC 206.

19. The applicant has acknowledged that he is not in a continuing relationship with the sponsor. There are no financial aspects of the relationship which would indicate any continuing relationship and the parties are not living together in a shared household. Although the parties remain on friendly terms, their relationship is not recognised as being a de facto relationship by their friends and family. Although the applicant would like to reconcile his relationship with the sponsor, there is nothing to indicate that the sponsor has any commitment to any long-term relationship with the applicant or that there is a mutual commitment to a shared life.
20. The Tribunal finds that at the time of this decision the applicant and the sponsor do not have a mutual commitment to a shared life to the exclusion of others and they are not living in a genuine and continuing relationship. The Tribunal finds the applicant and the sponsor do not live together and that they are living separately and apart on a permanent basis.
21. On the basis of the above the Tribunal is not satisfied that the requirements of s.5CB(2) are met at the time of this decision. Therefore, the applicant does not continue to meet cl.820.211(2) at the time of this decision. Accordingly, the Tribunal finds the applicant does not meet the criteria in cl.820.221(1).
22. There is no information before the Tribunal that the applicant would meet any of the alternative criteria in cl.820.221.
23. For the reasons above, the applicant does not satisfy the criteria for the grant of the visa.

DECISION

24. The Tribunal affirms the decision not to grant the applicant a Partner (Temporary) (Class UK) visa.

ATTACHMENT - Extract from Migration Regulations 1994

1.09A De facto partner and de facto relationship

- (1) For subsection 5CB (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5CB (2) (a), (b), (c) and (d) of the Act exist.

Note 1 See regulation 2.03A for the prescribed criteria applicable to de facto partners.

Note 2 The effect of subsection 5CB (1) of the Act is that a person is the de facto partner of another person (whether of the same sex or a different sex) if the person is in a de facto relationship with the other person.

Subsection 5CB (2) sets out conditions about whether a de facto relationship exists, and subsection 5CB (3) permits *the* regulations to make arrangements in relation to the determination of whether 1 or more of those conditions exist.

- (2) If the Minister is considering an application for:
- (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;

the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).

- (3) The matters for subregulation (2) are:
- (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day to day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being in a de facto relationship with each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).